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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-977

ACCURACY IN MEDIA, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT PUBLIC BROADCASTING SERVICE IN OPPOSITION

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BRIEF OF RESPONDENT PUBLIC BROADCASTING SERVICE IN OPPOSITION

Respondent Public Broadcasting Service hereby presents its brief in opposition to the Petition of Accuracy in Media, Inc., for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

QUESTION PRESENTED

Was the Court of Appeals correct in holding that the Federal Communications Commission has no jurisdiction to enforce Section 396(g)(1)(A) of the Communications Act of 1934 against the Corporation for Public Broadcasting?

STATEMENT OF THE CASE

This case involves the disposition made by the Federal Communications Commission ("Commission") of two complaints filed by the Petitioner, Accuracy in Media, Inc. ("AIM"). The complaints, filed on October 16 and November 20, 1971, alleged that two programs funded by the Corporation for Public Broadcasting ("CPB") and distributed to noncommercial educational television stations throughout the country by the Public Broadcasting Service ("PBS") violated the Fairness Doctrine and the provision of Section 396(g)(1)(A) which requires that programs or series of programs of a controversial nature made available to noncommercial educational television or radio broadcast stations adhere strictly to objectivity and balance.[1]

The Commission ruled on January 23, 1972, that no violation of the Fairness Doctrine had occurred. The Commission declined, however, to rule on AIM's complaint concerning Section 396(g)(1)(A) of the Communications Act. Rather, while noting its own doubts whether "the section [was] intended by Congress to set forth a specific standard subject to administrative enforcement rather than merely a general enunciation of the Corporation's functions," it requested briefs from interested parties on this issue and on the ques-

[1] Section 396(g)(1)(A) provides as follows:

"In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; . . ."

tion of whether, assuming it had jurisdiction, the provision imposed a standard other than the Fairness Doctrine.[2] AIM, PBS, CPB and others filed comments in response to the Commission's invitation.

On November 15, 1973, the Commission released its decision on the matter. *Accuracy in Media, Inc.*, 43 FCC2d 851 (1973).[3] It found that it did not have jurisdiction to enforce Section 396(g)(1)(A) against CPB. The Commission based its holding on Section 398 of the Act and the legislative history of the Public Broadcasting Act of 1967, which established CPB. It held that the language of Section 398 as well as the rest of of the Act and its legislative history constituted a clear congressional statement that CPB was to be free from government supervision of, or interference with, its activities. The Commission concluded that its exercise of jurisdiction to enforce Section 396 (g)(1)(A) would be inconsistent with that statutory scheme. The Commission did not reach the issue of what standard is imposed by the "objectivity and balance" provision of Section 396(g)(1)(A) and rejected the argument that the Public Broadcasting Act divested it of jurisdiction with respect to programs made available to the stations by CPB. *Id.* at 854, n. 4, Pet App. at 8a.

AIM appealed to the Court of Appeals for the District of Columbia Circuit and PBS, CPB and other parties intervened. On October 16, 1975, the Court of Appeals affirmed the Commission's decision, agreeing that the wording and legislative history of the Public Broadcasting Act of 1967 as well as the overall struc-

[2] *Accuracy in Media, Inc.*, 39 FCC2d 416, 420 n. 1 (1973).

[3] The decision is reprinted in the Appendix to the Petitioner's Petition for Certiorari at page 1a. Future references to material in that Appendix will be designated "Pet. App."

ture created by the Public Broadcasting Act supported the conclusion that Congress did not intend the Commission to assert regulatory jurisdiction over CPB. *Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288 (D.C. Cir. 1975), Pet. App. at 15a.

ARGUMENT

The issue presented by this case, whether the Federal Communications Commission has jurisdiction to enforce a provision of the Public Broadcasting Act against CPB, is a narrow one which has no impact on the regulatory scheme established by the Communications Act of 1934. The jurisdiction of the Commission over its licensees, both commercial and noncommercial educational (or public),[4] is unaffected by the decision below. Those licensees remain fully subject to the Commission's jurisdiction. Moreover, the decision below is clearly correct.

I. Introduction—The Structure Of The Public Television Broadcasting System

In order to understand the issue raised by this case, a brief description of the structure of the public television broadcasting system in the United States is helpful. That system consists of basically three elements: (1) the local public radio and television stations; (2) CPB; and (3) PBS.

[4] The term "public" broadcasting was introduced by the Carnegie Commission Report on Educational Television, *The Report of the Carnegie Commission on Educational Television: Public Television, A Program for Action* (1967), and the Public Broadcasting Act. P.L. 90-129, 11-7-67, 81 Stat. 365, 47 U.S.C. § 396 *et seq.* The stations themselves are licensed by the Commission as noncommercial educational television stations. *See* 47 C.F.R. § 73.621.

Local public television stations,[5] like other broadcasters, are ultimately responsible for the selection of the program material which they broadcast. They are, like commercial broadcasters, licensees of the Federal Communications Commission and are subject to its full regulatory authority. Indeed, with certain exceptions not herein relevant,[6] public television and radio stations are subject to the same rules and regulations as commercial broadcasters, including the Fairness Doctrine. *Accuracy in Media, Inc.,* 43 FCC2d 851, 854 (1973), Pet. App. at 8a.

CPB is a nonprofit organization established pursuant to the Public Broadcasting Act of 1967, 47 U.S.C. § 396 *et seq.* It is incorporated under the laws of the District of Columbia. CPB is a private corporation which is expressly stated by the Act not to be an agency of the United States. 47 U.S.C. § 396(b). It is governed by a board of fifteen directors appointed by the President and confirmed by the Senate. 47 U.S.C. §396(c). Under the Act, CPB is charged with promoting, facilitating and aiding the development of a public broadcasting system which will provide high quality programming obtained from diverse sources yet responsive to both local and national needs. CPB is to provide leadership and financial assistance in connection with a wide variety of activities which Congress deemed vital to the realization of public broadcasting's potential to serve the American public. At the same time, Congress sought to insure the independence and auton-

[5] Since this case involves only public television programs, PBS will limit its discussion to public television stations although the principles apply equally to public radio stations as well.

[6] *See, e.g.,* 47 U.S.C. § 399; 47 C.F.R. § 73.621.

omy of the local public stations. Thus, CPB was also charged with insulating the system from external pressure and influence and was enjoined to carry out its functions so as to preserve the maximum freedom and independence of the local stations. CPB is also precluded from owning or operating a broadcast station, system, network, cable television system, interconnection or program production facility. 47 U.S.C. §§ 396 (a) & (g).

The third major component of the public television system is PBS. PBS is not a creature of the Public Broadcasting Act nor is it mentioned in it. It was organized in 1969 by several public television stations, with the aid of CPB, to serve as the program distribution arm of the system. PBS is a nonprofit membership corporation whose membership consists of the licensees of approximately 250 noncommercial educational television stations. PBS distributes national public television programs to its members by means of facilities provided by communications common carriers. PBS also selects and schedules those programs for such distribution and manages cooperative funding mechanisms used by its members to obtain a portion of the national programming it distributes. The remainder of the programs are funded by CPB, corporations, foundations and other entities. Regardless of how a program is funded, PBS' members retain complete freedom as to whether or not they will broadcast programs distributed by it.

II. The Issue Raised In This Case Does Not Affect The Regulatory Scheme Of The Communications Act

The sole question raised by the Petition for Certiorari is whether the Commission and the Court properly concluded that the Commission lacks jurisdiction to enforce the "objectivity and balance" provision of Section 396(g)(1)(A) against CPB.[7] The Petitioner argues that this question warrants consideration because the decision below is inconsistent with principles of broadcast regulation established by this Court and raises important questions of federal law.

The assertions lack merit. The only question decided by the Commission and the only issue before the Court of Appeals was whether the Commission had jurisdiction to enforce the "objectivity and balance" provision of Section 396(g)(1)(A) against CPB. Both the Commission and the Court of Appeals decided after careful and close scrutiny of the statute and its legislative history that the Commission lacked such jurisdiction.[8] Both the Commission and the Court of Appeals expressly re-affirmed the Commission's full regulatory authority with respect to public television stations.[9] Thus the regulatory scheme established by the Communications Act of 1934 remains totally unaffected by the decision below. Public broadcast stations, just like their commercial counterparts, remain fully subject to the Commission's jurisdiction and are required to adhere to its rules, regulations and policies, including the Fairness Doctrine. Just like their commercial counterparts, public broadcast stations must still demonstrate that they are operating in the public interest, and they

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[7] Although the Commission also denied the Petitioner's Fairness Doctrine complaint, *Accuracy in Media, Inc.*, 39 FCC2d 416 (1973), the Petitioner did not seek judicial review of that determination.

[8] 43 FCC2d at 854, Pet. App. at 7a-8a; 521 F.2d at 292, Pet. App. at 20a.

[9] 43 FCC2d at 854, Pet. App. at 8a; 521 F.2d at 295, Pet. App. at 27a-28a.

are answerable to the Commission for any dereliction in the fulfillment of their obligations under the Communications Act. Nothing in the decision of the Court of Appeals can be employed, either by its terms or by analogy, to foreclose or limit the Commission's jurisdiction over its public television licensees.

The Petitioner's efforts to demonstrate a conflict with the principles enunciated by this Court in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), are misdirected. Those cases dealt with different issues and different provisions of the Communications Act. Nothing in the decision below undermines or is inconsistent with the holding or rationale of those decisions. Under the decision below, the Commission remains the sole entity responsible for the implementation of the legislative policies established in the Communications Act. Section 396(g)(1)(A), while a part of that Act, was enacted, along with Section 398, as part of the Public Broadcasting Act of 1967. That Act created a new legislative scheme to provide assistance and encouragement to noncommercial educational broadcasting. The scheme of that Act, while building on the existing broadcast system, is markedly different from the regulatory scheme established in the Communications Act itself. It seeks different goals from the Communications Act and employs different mechanisms for the realization of those goals. It is thus not surprising that Congress devised a different method to review CPB's performance under that Act. *Pottsville, Southwestern* and *Red Lion* are simply inapposite.

III. The Decision Of The Court Of Appeals Is Correct

Even if the issue in this case possessed the importance the Petitioner attributes to it, there is no reason for this Court to grant certiorari. The decision of the Court of Appeals is clearly correct and there are no conflicting decisions.

Both the Commission and the Court of Appeals concluded that Section 398 precludes the Commission from asserting jurisdiction to enforce Section 396(g)(1)(A) against CPB and that review of CPB's performance under that provision is reserved to Congress. That conclusion is fully supported by the language of the provisions themselves, by the scheme established by the Act and by its legislative history. Section 396(g)(1)(A) provides that CPB is authorized to:

> facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; . . .

Section 398 of the Act provides that:

> Nothing contained in . . . [Sections 390-399] shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, . . .

Since the Commission is clearly an agency of the United States, Section 398, by its terms, precludes the Commission's assertion of jurisdiction to enforce Section 396(g)(1)(A). This conclusion is further sup-

ported by the language of Section 396(g)(1)(A) itself. Thus, the section authorizes CPB, subject to the "objectivity and balance" provision, to "*facilitate* the full development of educational broadcasting in which programs of *high quality*, obtained from *diverse sources*" are made available to the local stations. [Emphasis added.] As the Court of Appeals correctly noted, such language is language of discretion, not of command. It establishes "a set of goals to which the Directors of CPB should aspire," 521 F.2d at 297, Pet. App. at 31a, not a substantive standard enforceable at law. Indeed, Commission enforcement of these provisions would inevitably enmesh the Commission in subjective determinations as to whether CPB was adequately "facilitating" the development of educational broadcasting or whether the programs made available to the stations were of sufficient quality or obtained from sufficiently diverse sources to satisfy the section. The Commission, as an agency of the United States, is uniquely unsuited to review such matters. *Cf. Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Further, it is clear from the legislative history of the Act that Congress did not intend CPB's decisions to be reviewed by the Commission. CPB was created as a mechanism which would enable the provision of federal financial assistance to public broadcasting. Congress had found that realization of public broadcasting's potential to serve the American public required federal funding to improve the quality, quantity and diversity of programming available to the local public television stations. At the same time, Congress sought to insure, to the extent possible, that the federal government did not control that programming—nor appear to control it. Thus, it provided for the creation of CPB as a nongovernmental, nonpartisan, nonprofit, private corporation, to insulate that programming from external political pressure arising from the system's funding. The House Report on the bill is clear:

> How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.
>
> Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit corporation . . . will provide the most effective insulation from Government control or influence over the expenditure of funds.[10]

Similarly, Senator Pastore commented during the Senate hearings on the bill:

> I intend to see that a full record is developed on this point and every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference over programming.[11]

Commission superintendence of CPB under the "objectivity and balance" provision of Section 396(g)(1)(A) is inconsistent with that goal. It will create the

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[10] *H.R. Rep. No. 572,* 90th Cong. 1st Sess. 15 (1967); *see also S. Rep. No. 222,* 90th Cong. 1st Sess. 4 (1967).

[11] *See Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 90th Cong. 1st Sess. 9 (1967). *See also* 113 Cong. Rec. 26384 (Remarks of Rep. Staggers).

very type of interference with the programming decisions of CPB which Congress sought to avoid.

Finally, the Petitioner's reliance on Section 399 to support a contrary result is misplaced.[12] Section 396 (g)(1)(A) deals with the Corporation while Section 399 deals with licensees. Since the Public Broadcasting Act was not intended to affect the Commission's regu-

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[12] Section 399 provides as follows:

"(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each licensee which receives assistance under this part after the date of the enactment of this subsection shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcasts such program.

(2) The requirements of paragraph (1) shall not apply with respect to a licensee's broadcast of a program if an entity designated by the licensee retains an audio recording of each of the licensee's broadcasts of such a program for the period prescribed by paragraph (1).

(3) Each licensee and entity designated by a licensee under paragraph (2) which retains a recording under paragraph (1) or (2) shall, in the period during which such recording is required under such paragraph to be retained, make a copy of such recording available—

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licensee or designated entity (as the case may be) of its reasonable cost of making such copy.

(4) The Commission shall by rule prescribe—

(A) the manner in which recordings required by this subsection shall be kept, and

(B) the conditions under which they shall be available to persons other than the Commission,

giving due regard to the goals of eliminating unnecessary expense and effort and minimizing administrative burdens."

latory authority over its licensees,[13] Commission enforcement of Section 399 with respect to its licensees is not inconsistent with the conclusion that its jurisdiction should not be extended to CPB. Moreover, the delegation of authority in Section 399(b) was added in 1973, P.L. 93-84, 8-6-73, 87 Stat. 219, subsequent to the passage of Section 398, and the delegation of that authority is of the type which is typically given to an administrative agency—to adopt administrative rules concerning the making available to the public of audio tapes. There is nothing in Section 399(b) or its legislative history to indicate that Congress intended, through its passage, to transform the system established by the 1967 Act and provide for general Commission oversight of CPB.

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[13] *Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 188, 221 (1967); *see also, e.g.*, 113 Cong. Rec. 26384 (Remarks of Rep. Staggers).

CONCLUSION

Petitioner AIM has demonstrated neither that the decision of the Court of Appeals presents an issue sufficiently important to be worthy of review by this Court nor that the decision is incorrect. Therefore, PBS prays that this Court deny certiorari in this proceeding.

Respectfully submitted,

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